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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: APR 27 2007

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IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Laura Deadrick
for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn, the appeal will be sustained, and the petition will be approved.

The petitioner performs litigation document coding services. It seeks to employ the beneficiary permanently in the United States as a management analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, an ETA Form 9089 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the job did not require an advanced degree professional.

On appeal, counsel explains that the ETA Form 9089 contained an error due to a glitch in LawLogix's software. While the unsupported assertions of counsel do not constitute evidence, *Matter of Obaigbena,* 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano,* 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980), counsel supports this assertion with affidavits, a printout of the document that was electronically transmitted to DOL and a letter from LawLogix. Subsequently, counsel asserts that DOL has certified a corrected ETA Form 9089 and requests that we rely on that form for the current petition.

The regulation at 8 C.F.R. § 103.2(b)(12) precludes us from considering an ETA Form 9089 certified after the petition in this matter was filed. That said, for the reasons discussed below, reading the ETA Form 9089 filed with the petition as a whole, we are persuaded that the job requires an advanced degree professional.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The beneficiary has a baccalaureate degree from York University evaluated as equivalent to a U.S. baccalaureate in economics from an accredited U.S. college or university. The beneficiary has more than five years of progressive experience in the specialty. The beneficiary, therefore, qualifies for the classification sought. The regulation at 8 C.F.R. § 204.5(k)(4), however, provides that the job offer portion of the alien employment certification "must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability."

As noted above, the ETA Form 9089 in this matter is certified by DOL. Thus, at the outset, it is useful to discuss DOL's role in this process. Section 212(a)(5)(A)(i) of the Act provides:

> In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
>
> > (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> >
> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

According to 20 C.F.R. § 656.1(a), the purpose and scope of the regulations regarding labor certification are as follows:

> (a) Under section 212(a)(5)(A) of the Immigration and Nationality Act (INA or Act) (8 U.S.C. 1182(a)(5)(A)), certain aliens may not obtain immigrant visas for entrance into the United States in order to engage in permanent employment unless the Secretary of Labor has first certified to the Secretary of State and to the Secretary of Homeland Security that:
>
> > (1) There are not sufficient United States workers who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work; and
> >
> > (2) The employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983), states:

> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14) [current section 212(a)(5)][1].

[1] As amended by Sec. 601, and as further amended by Sec. 172 of the Immigration Act of 1990, Act of Nov. 29, 1990, Pub. L. No. 101-649, 104 Stat. 4978; however, the changes made by Sec. 162(e)(1) were repealed by Sec. 302(e)(6) of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Act of Dec. 12, 1991, Pub. L. No. 102-323, 105 Stat. 1733, effective as though that paragraph had not been enacted.

Relying in part on *Madany*, 696 F.2d at 1008, the Ninth Circuit stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section [212(a)(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers.

Id. at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

> The Department of Labor ("DOL") must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* [§ 212(a)(5), 8 U.S.C. § 1182(a)(5)]. The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir.1983).

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

The key to determining the job requirements is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. Most significantly, it is important that the ETA Form 9089 be read *as a whole*.

In this matter, Part H, line 4, of the labor certification reflects that a Master's degree is the minimum level of education required. Line 8 reflects that, in the alternative, a baccalaureate degree plus "0" years of experience are acceptable. Most significantly in this matter, line 14 states:

> Company is willing to consider and accept what it deems to be a suitable combination of training, education and experience; Company considers a J.D. degree or a bachelors degree plus *no less than five years of progressive experience* as acceptable equivalents to a master's degree.

(Emphasis added.) CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). Where the job requirements in an alien employment certification are not otherwise unambiguously prescribed, e.g., by professional regulation, CIS must examine "the language of the labor certification job requirements" in order to determine what the petition beneficiary must demonstrate to be found qualified for the position. *Madany*, 696 F.2d at 1015. The only rational manner by which CIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). CIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification application form]." *Id.* at 834 (emphasis added). CIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

On appeal, counsel explains that the original data inputted through the LawLogic Software into the ETA Form 9089, line 8-C, was "5 yrs of progressive experience." The letter from LawLogix explains that they have "confirmed that DOL site, in this situation, could have taken the unacceptable text entry placed in H8C (5 yrs progressive experience) in LawLogix and converted it to a zero." The petitioner submits the advertising for the position, all indicating that a J.D. or baccalaureate must be followed by five years of experience.

We are bound by the form as certified by DOL. Thus, the mere fact that a clear error in transmission of data occurred is not dispositive. That said, we must also read the ETA Form 9089, Part H, as a whole. The language included in line 14 of that part is clear and unambiguous. We are persuaded that the job offer portion of the alien employment certification, when read as a whole, satisfactorily indicates that, where a baccalaureate is the only education, five years of progressive experience is required. The petitioner has satisfactorily shown that this position, at a minimum, requires a professional holding the equivalent of an advanced degree.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has met that burden.

ORDER: The decision of the director dated January 30, 2007, is withdrawn. The appeal is sustained and the petition is approved.